Lord Campbell, in *Beamish* v. *Beamish*, 9 H. L. Cas. 274. Theoretically, too, it is generally recognized that parties cast away on an unknown island could marry according to their own forms. Granted that all other conditions to a valid marriage are present, it is hard to discover in what way the presence of fraud upon the home law can be of any effect. It is punishable, but it cannot change the environment on which validity depends. See 11 HARVARD LAW REVIEW, 546. However this may be, the court would have been more clearly correct had they based their decision on the admitted principle that a ship carries with it the law of its State. *Crapo* v. *Kelly*, 16 Wall. U. S. 610; *McDonald* v. *Mallory*, 77 N. Y. 546. By this principle the parties were practically married in California, and were subject to the State laws.

MERGER OF CHARGES. — When there have been successive mortgages upon land and the first mortgagee buys up the first equity of redemption, it is of practical value to him to know whether that mortgage is extinguished. If it be extinguished, the second mortgagee has a first charge for which the land is liable; if, however, the first may still be regarded as existing, the second mortgage remains a second. When the land is not of sufficient value to satisfy both incumbrances the importance of the question is apparent. Equity, in accordance with sound justice, laid down the rule that when a charge, of any nature, vests in the owner of the property subject to that charge though *prima facie* it is merged, yet it may be regarded as existing if the holder has expressed an intention to that effect, and, in the absence of evidence of an intention, the court will consider what is most advantageous for him. *Forbes* v. *Moffatt*, 18 Ves. Jr. 390. But equity will not aid fraud, so there came a modification, — that a mortgagor who pays off the first charge cannot hold his extinguished debt as a shield against a second incumbrance. With this modification, *Forbes* v. *Moffatt* is still the law in the United States. *James* v. *Moray*, 2 Cow. 246; *Factors, &c. Ins. Co.* v. *Murphy*, 111 U. S. 738.

In England, however, the case of *Toulmin* v. *Steere*, 3 Mer. 210, declared that this modification extended to a purchaser of the equity of redemption, and that if he later obtained the mortgagee's interest in the land, he might not keep it alive to defeat the claim of a second incumbrance of which he had notice. The ground taken was that the purchaser with notice from a mortgagor should not be in a better position than the mortgagee. But it seems clear that he stands in a different relation to the mortgagor. He is not a debtor; he is not attempting to set up an extinguished debt. He paid for the mortgagor's rights in the land, and there is no reason why the second mortgagee should have his claim turned into a first mortgage by a transaction to which he is a stranger, in which no such result was intended by the parties. This is, indeed, the typical case where equity will interfere according to *Forbes* v. *Moffatt*, and the later decision is the more remarkable because the opinions in both cases were delivered by Sir William Grant, M. R.

The new doctrine was often adversely criticised, then entirely metamorphosed by Jessel, M. R., in *Adams* v. *Angell*, 5 Ch. D. 646, who explained that its application was limited to cases where there was no evidence of intention in regard to merger. Even thus restricted, the doctrine was at variance with *Forbes* v. *Moffatt*, and continued to be dodged and ignored until *Liquidation Estates Purchase Co.* v. *Willoughby*,

44 W. R. 612. In this case, according to the view taken by the Court of Appeal, there were three contemporaneous mortgages; one of the mortgagees assigned all his interest to the mortgagor, and there was later a foreclosure. Although the fund mortgaged was insufficient to pay the mortgage debts, the mortgagor wished to share in the fund by virtue of the assignment to him, claiming that there had been no merger. The court, after noting *Toulmin* v. *Steere*, restated the doctrine of *Forbes* v. *Moffatt*, that in the absence of evidence as to intention, equity would interfere to prevent merger when it would be to the interest of the parties, though in the case before them, they found evidence of a contrary intention which defeated the claim of the mortgagor. Although the mortgages were contemporaneous, it seems the case is practically that of a mortgagor trying to hold up a past debt as a shield to an existing one. The decision is the more notable, then, for so far from following *Toulmin* v. *Steere* in extending the modification to *Forbes* v. *Moffatt*, the court tend to restrict it. The case has recently come before the House of Lords, 46 W. R. 589. The decree which the lower court had affirmed was varied on other grounds, but the statements of the law as to merger seem to have been approved. It is probable, then, that Sir William Grant's error has been wiped out by the slow processes of the law, and that *Toulmin* v. *Steere*, first doubted, then curtailed, is now practically overruled.

SALES BY AUCTION. — The fall of the hammer in a sale by auction marks the conclusion of the contract between vendor and vendee, but that contract is worthless without a memorandum sufficient to satisfy the Statute of Frauds. In the case of *Johnson* v. *Boyes*, Irish Law Times, vol. xxxii. p. 460, after the agent of the plaintiff had been declared the highest bidder at an auction, — it does not appear whether for land or goods, — the vendor interposed and instructed the auctioneer not to complete the formal record of the contract. The plaintiff, during the pendency of an action at law, made application for an interlocutory injunction to restrain a second sale. Justice Stirling denied the application. It seems he was clearly right; the claim was at best a doubtful one, and so no ground for an injunction, and the plaintiff could show no enforceable contract on which to base his rights. *Farmer* v. *Robinson*, 2 Camp. 339 (note); *Warwick* v. *Slade*, 3 Camp. 127. The infrequent *dicta* which suggest that the auctioneer's authority to make the memorandum cannot be revoked after the hammer has fallen, are merely attempts to evade the statute.

The question naturally arises whether the disappointed vendee has a cause of action against the auctioneer. Probably no court would spell out a contract, that the auctioneer promised that his authority would not be revoked. Nor does it seem possible that the vendee could sue the auctioneer in tort on the ground that he has not done his duty as the vendee's agent. It is true it has been held that a memorandum of sale written by an auctioneer is a memorandum by an agent of the vendee and so sufficient to satisfy the Statute of Frauds, but the agency which the law sees imposes no duty to make a memorandum. It is clear, from the language of the cases, that it amounts merely to this, — that the vendee, by a nod or a lift of his hand, permits the auctioneer to sign the memorandum for him. *Emmerson* v. *Heelis*, 2 Taunt. 38: *Bird* v. *Boulter*, 4 B.